APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

(Filed in Clerk's office June 16, 1962)

CIVIL ACTION NO. 2122

W. R. B. CORPORATION, ET AL, d/b/a ROBERTSON CONSTRUCTION COMPANY, AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR, AND FIVE,

Plaintiffs

V.

ODELL GEER, d/b/a ODELL GEER COMPANY,

Defendant and Cross-Plaintiff and Third Party Plaintiff

V.

J. E. RILEY & SON, INC., MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BANK OF DALLAS,

Third Party Defendants

and

CIVIL ACTION NO. 2125

W.R.B. CORPORATION, ET AL, d/b/a ROBERTSON CONSTRUCTION COMPANY AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR AND FIVE,

Plaintiffs

V.

B. H. (BERT) CAMP, d/b/a B. H. C. MATERIALS COMPANY,

Defendant and Cross-Plaintiff and Third Party Plaintiff

V.

MASSACHUSETTS BONDING AND INSURANCE COMPANY AND
REPUBLIC NATIONAL BANK OF DALLAS,
Third Party Defendants

Motion to Consolidate the Record for Appeal

Comes now the counsel for both parties in each of the above entitled and numbered causes, and move the Court to consolidate the record in the said causes for appeal purposes.

/s/ Robert C. Howell

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Attorneys for Plaintiffs, Cross-Defendants and Third Party Defendants in Causes No. 2122 & 2125

/s/ Lee Curtis

Lee Curtis
Professional Building
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Attorney for Defendants, Cross-Plaintiffs and Third Party Plaintiffs in Causes No. 2122 & 2125

(Caption omitted)

) CIVIL ACTION NO. 2122
)
) CIVIL ACTION NO. 2125

Order of Court Consolidating Record on Appeal

It appearing to this Court that the motion for consolidation of the record for appeal purposes

would expedite the appeal in these cases, and having been approved by counsel for both parties of record.

It is therefore ORDERED, ADJUDGED, AND DECREED by the Court that the record in Cause No. 2122 and Cause No. 2125 be consolidated for the purposes of appeal.

Done at Austin, Texas, this 15th day of June, 1962.

/s/ Ben H. Rice, Jr.

United States District Judge

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 20999

W. R. B. CORPORATION ET AL d/b/a ROBERTSON CONSTRUCTION COMPANY, AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR, AND FIVE; J. E. RILEY & SON, INC., MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BAND OF DALLAS,

Appellants,

versus

ODELL GEER, d/b/a ODELL GEER COMPANY, and B. H. (BERT) CAMP, d/b/a B. H. C. MATERIALS COMPANY

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(May 20, 1964.

Before HUTCHESON and BROWN, Circuit Judges, and CHRISTENBERRY, District Judge.

PER CURIAM: On its former appearance in this Court, *W.R.B. Corp. v. Geer*, 5 Cir., 1963, 313 F.2d 750, we remanded this case because the District Judge had not properly applied the clearly erroneous standard in the review of the findings of the special master. F.R.Civ.P. 54(e)(2). Our reconsideration on the briefs and argument and the record made by

the District Judge on remand reveals two things without question. First, on remand the District Court carefully applied the correct legal standard which we epitomized in our former opinion. Second, applying those standards, there was ample basis for sustaining the Special Master's findings. No point would be served by discussing each of these items or the evidence pro and con on them. There was conflict and the Special Master resolved it. There is ample basis for his resolution.

That leaves only the question of law as to whether the District Judge could disregard the findings of the Master relating to the effect of certain releases. We agree with the District Court that under the controlling Texas cases e.g., *Oviett v. Warner*, Tex. Comm'nApp., 1926, 288 S.W. 434; *First Texas Prudential Ins. Co. v. Conner*, Tex.Civ.App., 1919, 209 S.W. 417, the releases lacked legal consideration to support a discharge of the particular items allowed by the Master. This being true, the Master's findings relating to the releases were clearly erroneous if findings of fact, and were clearly wrong if conclusions of law. In either event the District Judge properly set them aside.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1963

No. 20999

D. C. Docket No. 2122 and 2125 Civil

W. R. B. CORPORATION, ET AL d/b/a ROBERTSON COMPANY, AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR, AND FIVE; J. E. RILEY & SON, INC., MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BANK OF DALLAS,

Appellants,

versus

ODELL GEER, d/b/a ODELL GEER COMPANY, and B. H. (BERT) CAMP, b/d/a B. H. C. MATERIAL COMPANY,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

Before HUTCHESON and BROWN, Circuit Judges, and CHRISTENBERRY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged by this Court that the appellants, W.R.B. Corporation, and others, d/b/a Robertson Construction Company, and Allied Builders, and others, and Fort Hood Housing Corporations Nos. One, Two, Three, Four, and Five; J. E. Riley & Son, Inc., Massachusetts Bonding and Insurance Company and Republic National Bank of Dallas, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 20, 1964

Issued as Mandate:

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19952

W.R.B. CORPORATION, ET AL., d/b/a ROBERTSON CONSTRUCTION COMPANY, ET AL.,
Appellants,

versus

ODELL GEER, d/b/a ODELL GEER COMPANY; and B. H. (BERT) CAMP, d/b/a B. H. C. MATERIALS COMPANY,
Appellees.

Appeal from the United States District Court for the Western District of Texas

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(January 30, 1963)

Before HUTCHESON, BROWN and WISDOM, Circuit Judges

BROWN, Circuit Judge: These two cases growing out of a large government construction project were consolidated for trial, but the entry of separate judgments. In each of them, the Contractor sued the Subcontractor to recover alleged overpayments made to the Subcontractor. In each the Subcontractor filed a counterclaim against the Contractor. In the final judgment in each case the Contractor recovered nothing whereas each of the Subcontractors obtained a substantial recovery for additional sums. The Contractor appeals in each case. The appeals have been consolidated. All of the contentions of the Contractor as Appellant arise out of the fact that the cases were referred to and tried and determined by a Master.

Because these claims and cross claims presented a great number of controversies growing out of specific provisions of the various contracts, subcontracts, work, service and materials furnished thereunder, the District Court without objection to any of the parties concluded that it was one properly before trial before a Master under F.R. Civ. P. 53(b). The order in each found "that this is a case in which the issues are long and complicated, and * * * is a matter of account * * *." The Master was ordered to "take evidence and ascertain the amounts of damages, if any sustained by any of the parties * * *" and to "* * * report his findings and conclusions to this Court * * *." The parties shortly proceeded to extensive hearings be-

for the Master. The hearings lasted about seven days, and the record of the testimony and other proceedings covers over 1,000 pages. In addition the original exhibits sent up with the record number approximately 120 and run another 2,000 sheets or so. Upon the completion of the evidence, the parties submitted written memorandum briefs and arguments to the Master. But before the Master had an opportunity to pass upon the issues and render his report (as the order called for), he became incapacitated by acute illness from which he never recovered. The District Court thereupon entered an order appointing a successor Master. This order provided that the successor Master was "appointed as Special Master wit' all of the powers granted to the * * *" original Master. It was further ordered the the successor Master "shall make a report to this Court of his findings of fact and conclusions of law based upon the evidence heretofore taken by the [original Master] and upon the record of such evidence with the power, however, to take any further evidence which [the successor Master] may deem necessary." No objection was made by any party to the appointment of a successor Master, the entry of this order, or any of its terms. Specifically no objection or exception was taken to the provision that the successor Master should determine the controversy on the basis of the existing record. Although the order allowed the taking or retaking of further testimony, neither party offered any additional evidence, nor was any request made that hearings for such purpose be held.

The successor Master, after consideration of the existing record—including the memorandum briefs and arguments previously filed—took the case under advisement. Several months thereafter he rendered a separate report in each case containing detailed findings of fact and conclusions of law. To each report the Contractor (the present Appellant) filed numerous detailed exceptions. These generally attacked the specific findings because not supported by sufficient or any evidence and because such findings were clearly erroneous. They were also amplified by specific request for additional findings, conclusions of law, or both. No exception or objection was urged that the successor Master had reached his conclusions based upon the prior record. Nor was there any exception or objection that the successor Master should have heard any part, or all, of that testimony again through the personal appearance of the witnesses before him. Likewise, there was no exception or objection as to any procedural action, or non-action, on the part of either the original or successor Master.

The District Court thereafter held a hearing on the exceptions to the Master's report. This was attended by counsel and the successor Master. The Court sustained certain exceptions urged by the Subcontractors in one of the two cases. But other than this the Court, by formal order, subsequently overruled all exceptions filed by the Contractor. It bears repeating that at no time prior to the entry by the District Court of the order confirming the reports (except as modified) of the successor Master was objection or exception ever made by the Ap-

pellant either to (a) the case being referred to the successor Master, or (b) to his consideration and determination of the controversy on the basis of the initial existing record. Indeed no such objections were made at any time prior to the filing of the briefs in the consolidated appeals in this Court.

As we are certain that this careful and experienced trial Judge would have made appropriate provisions for the appearance or re-appearance of any critical witnesses for oral examination or re-examination before the successor Master had either one or both of the parties made this known to the Court or informed him of circumstances indicating that this was advisable or necessary, there is no basis for the belated charge now made before us that the District Court erred in not requiring a complete or partial rehearing of the evidence before the successor Master. We can therefore accept *Smith v. Dental Products Co.*, 7 Cir., 1948, 168 F. 2d 516, urged by the Appellant, without determining whether there is really any substantial conflict between it and *D.M.W. Contracting Co. v. Stoltz*, D.C. Cir., 1946, 158 F. 2d 405.

However, while we reject this basic contention and others related to it, we are unable at this time to affirm the judgment outright. A consideration of the record leaves us in doubt that the District Judge gave that review of the record and the successor Master's report which the law requires.

Under F.R. Civ. P. 53(e)(2), the trial Court, in an action tried without a jury, "shall accept the

master's findings of fact unless clearly erroneous." Of course, it is precisely because the findings come with such formidable support, that a Court at some stage must determine as a judicial matter that the findings meet that test and are the product of correct principles of law.

But in this record and from the extended colloquy between the Judge and the Contractor's counsel on the hearing of the objections to the successor Master's report, we gain the impression that the trial Judge did not consider that he had the task here of subjecting the reports to this test. In the first place he repeatedly spoke in terms of "substantial evidence." Were this standing alone we would think that this was merely the Judge's shorthand reference to "clearly erronous." But it does not stand alone. For in this very protracted exchange, it is apparent to us that the Judge put an interpretation on counsel's concession which counsel did not mean to imply even though each was using the same term "substantial evidence." When counsel finally stated that as to the various findings excepted to there was "substantial evidence," the Court announced, "with the admission that there is substantial evidence to support the Master's findings, I am going to let them stand. I will overrule your objections." But it is plain to us that counsel used this expression merely to acknowledge the existence and identification of testimony or exhibits offered in support of the findings. His arguments, each time, were in terms of opposing evidence which, he claimed, made the Master's findings insupportable.

In view of this we cannot indulge any assumption that the Judge was using "substantial evidence" as the equivalent of "clearly erroneous." To pass that test the evidence must, of course be substantial. But unlike the Judge's function in passing on the sufficiency of the evidence in a jury case, it does not end there. As does the appellate Court in reviewing like findings of a District Court, the clearly erroneous concept of F.R. Civ. P. 52((a) requires findings to be set aside if the Court is left with the impression that the result is not the truth and right of the case. In this sense, at least, the two terms are not synonymous, and the Judge had the obligation to determine that this record and the attacked findings satisfied that meaning as well. 2B Barron & Holtzoff, Federal Practice & Procedure §1135 (Wright ed. 1961) citing this Court's decisions in *Sanders v. Leech*, 5 Cir., 1946, 158 F. 2d 486; *United States v. Kaplan*, 5 Cir. 1960, 277 F. 2d 405; *Manufacturer's Cas. Ins. Co. v. Instrusion-Prepakt, Inc.*, 5 Cir. 1959, 264 F. 2d 758; *Slattery Co. v. United States*, 5 Cir., 1956, 231 F. 2d 37; *Western Cotton-oil Co. v. Hodges*, 5 Cir., 1955, 218 F. 2d 158.

Of course in carrying out this vital judicial duty a Court is entitled to the assistance of counsel in pinpointing both the specific issues under attack and the relevant portions of the record demonstrating the asserted presence or absence of evidence. But essential as is a Court's dependence on counsel it cannot escape the judicial travail incident to the objections by putting the burden on counsel alone.

To assure that the Judge has fulfilled that judicial function, the final judgment must be vacated and

the causes remanded for such determination of all the objections to the Master's report which were raised and pending by any or all of the parties. In view of this approach, we have not undertaken to assay the correctness of any of the findings or conclusions of law by the Master. We intimate no opinion on them.

We do not undertake to blueprint the proceeding on remand before the District Court, but quite obviously the Court in entitled to call on counsel for further written memoranda, briefs, and oral argument of desired to assist the Court in ths study and consideration of this substantial record. In the event of any appeals from the final orders of the Court on redetermination pursuant to this remand, the parties shall be entitled to use the present appellate record (and briefs) supplemented as necessary without the necessity of reproducing it.

VACATED AND REMANDED.

APPENDIX E

Amendment V, U.S. Constitution—No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

Rule 53, Federal Rules of Civil Procedure.

(a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but whe the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or

to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceeding in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of rference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties of their

attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice of the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to

him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the

parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

APPENDIX G

Second Specification

The Trial Court erred in refusing to provide in its judgment a credit in favor of Robertson Construction Company for the money represented by the overcharge to Robertson occasioned by the weighing of the asphalt aggregate with the OA 90 in it, for the substantial evidence establishes that Robertson was charged twice for the same oil (R. 179; 180).

Third Specification

The Trial Court erred in refusing to provide in its judgment a credit in favor of Robertson Construction Company for the money represented by the overcharge to Robertson of 20¢ a gallon rather than 17¢ a gallon for the OA 90 oil (R. 181).

Fourth Specification

The Trial Court erred in refusing to provide in its judgment a credit in favor of Robertson Construction Company for the damages occasioned to it because of the conduct of Camp, in having to remove the flexible base, haul off the base, haul in new base, compacting the new base, and repriming the same. (R. 181).

APPENDIX H

First Specification in the Camp Case

The Trial Court erred in entering judgment against Appellant for asphalt billed to it by Appellee Camp in excess of approximately 45 tons (R. 186).

A. The parties to the agreement in question contemplated that approximately 4500 tons of asphalt would be required, and to allow a recovery in favor of Camp for the amount demanded by him, would be to alter the obvious import of the agreement and constitute a judicial re-writing of the contract and agreement between Robertson and Camp, under which the asphalt was furnished.

B. The uncontroverted testimony of the witnesses Elliott Maltzman, Donald Moreau, Bert H. Camp and Stacy McKnight establishes that no more than approximately 4500 tons of asphalt could have possibly gone into the streets.

1. The Trial Court erred in overruling Appellant's objections (R. 178) to the Findings of the Special Master numbered three, four and fiice.

2. The Trial Court erred in refusing to adopt the Appellant's Requested Findings of Facts numbered one, two, three, four and five, for the substantial evi-

dence (adduced from Appellant's and Appellee's witnesses) is in support of the Requested findings and not the findings of the Special Master. (R. 172).

Second Specification in the Geer Case

The Trial Court erred in not finding that the Robertson Construction Company had overpaid Appellee, under the contract agreement of the parties, sums in excess of Thirty Three Thousand Five Hundred Sixty Three and No/100 Dollars ($33,563.00), and failing to allow Robertson a recovery or offset against Geer for that amount.

A. The evidence establishes that the parties contemplated that the dirt work contract wold cost Thirty Two Thousand Seven Hundred Seventy Five and No/100 Dollars ($32,775.00), and Robertson Construction Company has paid Odell Geer, to date, in excess of One Hundred Sixty Eight Thousand and No/100 Dollars ($168,000.00), and is therefore entitled to a judgment against Odell Geer for the balance.

B. It was totally without the contemplation of of the parties that the work contracted for with Odell Geer would cost the sum of Two Hundred Thousand Four Hundred Ninety Eight and 25/100 Dollars ($200,498.25), being the amount already paid by Robertson Construction Company to Odell Geer, and the Thirty Two Thousand Four Hundred Ninety

Eight and 25/100 Dollars ($32,498.25), claimed by Odell Geer to be still due and owing him.

APPENDIX I

SMITH V. DENTAL PRODUCTS CO. INC., et al

NO. 9461

Circuit Court of Appeals, Seventh Circuit

June 8, 1948

LINDLEY, District Judge.

Following the mandate of this court, as ordered in Smith v. Dental Products Co., 7 Cir., 140 F. 2d 140, the District Court, having entered a decree enjoining defendants from using the trade-marks of plaintiff and from continuing unfair competition, referred the cause to a master to take and report an accounting as to the profits and damages for infringement of trade-marks and unfair competition incurred by plaintiff during the period of some nine years following February 10, 1936. The master heard evidence at various times and, according to the transcript, on January 18, 1946, the parties agreeing, declared the proofs closed. He remarked, however, that if, after he had been able to examine the record, he should deem the evidence insufficient, he would not foreclose himself from the right to require further evidence. This reservation, he said, he made because of the broad differences between the parties and the different conclusions of the respective auditors. Thereafter, before making any findings or report, the master died. A transcript of

the evidence submitted before him, certified as correct by a private reporter, was later lodged with the District Judge.

On September 13, 1964, the court entered an order referring the cause to another master but two months later vacated it. Thereafter, on June 25, 1947, after the respective parties had presented their written briefs and arguments, the court, after considering the transcript then in its possession, entered final judgment against the corporate defendant, without special findings of fact or conclusions of law but including in the formal judgment a finding that 'plaintiff is entitled to recover on the basis of reasonable royalties for the period' in question and is 'hereby awarded the sum of $60,000 as profits and damages for trade-mark infringement and unfair competition', interest at 6% and costs.

Defendant now asserts that the District Court erred in failing to make special findings of fact and conclusions of law, as required by Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c; that, inasmuch as the master to whom the cause had been referred died before making a report, findings or recommendations, it was the duty of the court either to refer the cause to a second master for the purpose of a hearing de novo or to hear evidence itself; that the entry of judgment upon the transcript of testimony before the master and in the absence of findings by the master constitute deprivation of due

process of law, and that the judgment is contrary to the law and the evidence.

Under the Federal Rules of Civil Procedure (52(a)) the court 'shall find the facts specifically and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.' This rule has been considered in Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 S. Ct. 517, 84 L. Ed. 774; Bowles v. Russell Packing Co., 7 Cir., 140 F. 2d 354; Bank of Madison v. Graber, et al., 7 Cir., 158 F. 2d 137; Dearborn National Casualty Co. v. Consumers Petroleum Co., 7 Cir., 164 F. 2d 332 and in various decisions in the different circuits in agreement with the announcements of the cases cited. It is clear from these decisions that the requirements of the Federal Rules of Civil Procedure that the District Court make findings of fact and state conclusions of law must be reasonably complied with. As this court has said, 'a fair compliance with this rule is mandatory.' (140 F. 2d 355. 'These are * * * mandatory provisions which should be respected; they are not meaningless words'; "findings of fact on every material issue are a statutory requirement.' (158 F. 2d 141) 'There must be such subsidiary findings of fact as will support the ultimate conclusion reached by the court. Kelley, et al v. Everglades Drainage District, 319 U.S. 415, 420, 422, 63 S. Ct. 1141, 87 L. Ed. 1485.' (164 F. 2d 333) Clearly the ultimate finding of liability is not fair compliance and the failure of the District Court in this respect constitutes error under the facts of the case.

Plaintiff has submitted various citations to the effect that failure to comply with the rule is not fatal, if included in the judgment or opinion are findings and conclusions sufficient to constitute substantial compliance. Undoubtedly the rule does not require always the strictest technical compliance and the situation may be such that, by findings and conclusions in a memorandum of the trial court, substantial compliance is reflected, in which instance there is no error. Here there was no opinion, no memorandum of fact and law but only the ultimate finding.

We are confronted with another serious question, this is, the effect of the master's death before he had made a report. The evidence was controverted; several hearings were had, controverted testimony was submitted and the master himself remarked that the status was such that he might require the submission of further evidence. In other words, the master's judgment upon the creditability of the witnesses appearing, we can never know. The rules contemplate that the District Court shall approve the findings of the master 'unless clearly erroneous', but what the master thought about the witnesses, what he would have found as a matter of fact as to the verity of the testimony, matters which are part and parcel of the purpose of the reference to the master to make findings and report to the court, are absent, and the reference, so far as legal effect is concerned, is a nullity.

Nor did the District Court see the witnesses. In Buchsbaum & Co. v. Federal Trade Commission,

7 Cir., 153 F. 2d 85, 87, this court dealt with a similar situation. There a trial examiner of the Federal Trade Commission died before rendering his decision. We said: 'The elementary principle underlying all trials of whatever nature seems to be that the rule of confrontation shall be applied where the witnesses are available for that purpose, * * * Here there is no claim by anyone that the witnesses were unavailable, and counsel has cited no decision of our Supreme Court which in any way abrogates the ruling in the Ohio Bell Telephone case (Ohio Bell Telephone Co. v. Public Utilities Comm., 310 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093) and the Morgan case (Morgan v. United States, 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. (1129), supra, both of which cases hold that a failure in this respect would amount to a failure of due process.' The reason for the rule is applicable here; the deciding officer, whether administrative in character or judicial, has a real function to perform in due process. The defect is one going to the right of the parties to have a decision from the agency having jurisdiction upon the merits upon testimony submitted by witnesses whom the trial tribunal has seen and heard. In Morgan v. United States, 298 U. S. 468, at page 480, 56 S. CC., 906, 911, 80 L. Ed. 1288, the court said: 'There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & Southern Ry. Co., supra (265 U.S. 274, 44 S. Ct., 565, 68 L. Ed. 1016). Facts and circumstances which ought to be

considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are neded to sustain the order. * * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.' See also In re Rubin and Lipman, D. C., 215 F. 669; McAllen v. Souza, 24 Cal. App. 2d 247, 74 P. 2d 853; People v. Lewe, 383 Ill. 549 50 N. E., 2d 577; Wainright v. P. H. and F. M. Roots Company, 176 Ind. 682, 97 N. E. 8; Labonte v. Lacasse, 78 N. H. 489, 102 A. 540; Hawley v. Priest Rapids Ice & Cold Storage Co., 172 Wash. 71 19 P. 2d 400. We think it was the duty of the District Court, in the absence of findings and report from the master, in order to afford the parties a hearing within the recognized legal meaning of that word, to direct a trial de novo before another master or before itself.

In this view of the case, it is unnecessary to consider, in fact there are not presented, any other question pertinent or necessary to our decision.

The judgment is reversed with directions to proceed in accordance with the announcements herein."